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No. 92-780

IN THE

Supreme Court of the United States

October Term, 1993

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members and other women who use or may use the services of women's health centers that provide abortions; DELAWARE WOMEN'S HEALTH ORGANIZATION, INC.; and SUMMIT WOMEN'S HEALTH ORGANIZATION, INC., on behalf of themselves and all other similarly situated clinics,

Petitioners,

v.

JOSEPH M. SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE, INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE, and OPERATION RESCUE

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENT MONICA MIGLIORINO (MILLER)

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QUESTION PRESENTED FOR REVIEW

Was the Second Amended Complaint, alleging Hobbs Act extortion under RICO, properly dismissed where neither it, nor Petitioners' RICO case statement, asserted facts showing that the alleged conduct of the Respondents, and Respondent Migliorino in particular, was objectively directed toward an economic goal, but rather, where such conduct was aimed at goals that were social or political in nature?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

Respondent Monica Migliorino (Miller) is an individual, and has no parent or subsidiary companies. The Petitioners have accurately listed the parties to this proceeding.

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OPINIONS BELOW

Respondent Monica Migliorino (whose married name is now Monica Miller) accepts the description, by Petitioners, of the opinions of the lower courts in this matter.

STATEMENT OF JURISDICTION

This Respondent accepts the Statement of Jurisdiction by the Petitioners.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The following statutory and Constitutional provisions are in addition to those statutory provisions referred to by Petitioners, (Br. Pet. 1-3):

The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Hobbs Act provides in pertinent part:

> The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right. 18 U.S.C. § 1951(b)(2) (1982).

18 U.S.C. § 1962(d) provides:

> It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

STATEMENT OF THE CASE
THE LENGTH AND BREADTH OF THIS CASE IS EXTENSIVE

Petitioners' original action was filed on October 17, 1986. J.A.1. The Complaint alleged that the defendants, who are pro-life activists, and their pro-life organizations had violated

the Sherman Antitrust Act, 15 U.S.C. § 1 et seq. Respondent Monica Migliorino (hereinafter referred to as "Migliorino") was not named in the original Complaints, and no claims were asserted under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961 et seq.

Over the course of approximately three years discovery proceeded and numerous depositions were noticed by petitioners (R.130-140). Nearly three years later, the Petitioners filed their Amended Complaint, followed subsequently by Petitioners' Second Amended Class Action Complaint (hereinafter referred to as "Complaint") on September 22, 1989. J.A. 13, R. 236. In the amended pleadings Petitioners added additional pro-life activists and organizations as defendants, including Migliorino, and asserted claims under RICO as well as pendent state law claims.

Over objections filed by counsel, Migliorino's deposition was ordered to proceed (J.A. 14, R. 241) and her testimony commenced on October 11, 1989, extended into October 12, 1989, and was concluded on July 23, 1990.

By the time the trial court entered its Decision and Order dismissing this action in its entirety on May 28, 1991 (J.A. 36, R. 500) the Petitioners had served their third separate request for production of documents (J.A. 35, R. 485). All of the Respondents in this case have been deposed, sometimes multiple times, and numerous non-party witnesses have been deposed by Petitioners as well.

Two months before the dismissal of the action, on March 18, 1991, the Petitioners filed their RICO Case Statement (J.A. 87-117) in response to a trial court Order requiring that the Petitioners set forth the "facts" "in detail and with specificity" upon which the Petitioners relied, regarding twenty critical aspects of RICO claims (J.A. 81-86). The factual matters to be set forth by the Petitioners included a description of the misconduct of the Respondents, a designation of the subsections under

18 U.S.C. § 1962 (a)-(d) relied upon to posit RICO liability, a listing of all wrongdoers, a listing of the "alleged predicate acts and specific statutes which were alleged [sic] violated," a description of how the predicate acts formed a "pattern of racketeering activity," a description of the alleged "enterprise," and a description of the alleged victims and how they were injured (Id.).

THE ALLEGATIONS OF THE COMPLAINT

Four claims are asserted against Migliorino. The first, denominated as Count III, sets forth a claim for violation of § 1962 (c) of RICO. J.A. 72-73. The gist of the claim is that this Respondent participated in the affairs of the racketeering enterprise ("PLAN") through a pattern of racketeering activity consisting of predicate acts of "extortion" (Id. ¶109,99). These "extortionate" acts are alleged to constitute violations of 18 U.S.C. § 1951 (the "Hobbs Act"), J.A. 66 (¶97, which is realleged against Migliorino at ¶106, J.A. 72).

Migliorino's asserted "extortionate" conduct consists of the fact that she "took part" in, and was a speaker at a conference sponsored by PLAN, J.A. 54 (¶55), that she planned, and took part in a retrieval of the human remains of aborted babies from a loading dock of a pathology lab which provided disposal of the remains (the remains had been in a storage drum with "other medical waste" J.A. 58 (¶67), and that she conducted and publicized "funeral masses" and burial ceremonies for those remains, J.A. 57-61, at which time she is said to have further "threatened to disclose confidential information about previous patients of these clinics" (the confidential information is not specifically described, though the Petitioners considered it an "obvious" risk to the identities of patients) J.A. 60 (¶75), threatening to, and in fact releasing the names of the abortion clinics where the human remains were generated, J.A. 59-60, 69 (¶98j), and that, lastly, she pressured a landlord not to rent to an abortion clinic by sending letters "threatening disruption and

harassment" (ie. "pickets and demonstrations...sidewalk counselors...press coverage...") if the abortion clinic moved in. J.A. 61-62, 77 (¶125).

The second claim, Count V, asserts that this Respondent committed a state law tort of interference with a prospective economic advantage. J.A. 75-77. The final claim, Court VI, asserts a claim for state law tortious interference with an existing business relationship (relating to Migliorino's activities regarding the landlord and his decision whether to lease to an abortion clinic) J.A. 77-78.

In Count IV, Petitioners allege that Migliorino participated in a conspiracy to violate RICO, under § 1962 (d), but adds no additional substantive allegations, and does not name her as a defendant. J.A. 74.

MIGLIORINO'S ANSWER

Among other assertions, this Respondent denied any "theft" of the aborted remains J.A. 21, R. 314 (¶37 App. A2).

Petitioners' characterization of the actions of Respondents as theft evokes incredulity. Even the Petitioners admit that they were stored for waste disposal, and that the Respondents were told of the exact location of the remains by the pathology lab, and Migliorino and others were allowed to gather the remains under the watching eye of the employees of the lab, who "did nothing to stop" the retrievals. J.A. 58 (¶66-67).

Migliorino further asserted that the remains had been abandoned to public "disposal," R. 314 (¶67) (App. A2-3) and that the funeral masses and ceremonies were performed as an act of religious worship and faith:

> "Insofar as ...Migliorino (Miller) participated in the handling, funeral rites, burial of the unborn victims of abortion, she did so motivated by her religious belief and in the context of religious worship, believing that such funeral rites and burials were an act of charity

> and a work of mercy, affording such unborn victims a measure of recognition of individual worth and human dignity." (Id. at App. A4-5: Affirmative Defenses to Count I)

Migliorino further denied ever threatening to invade the privacy of abortion patients and asserted that she had taken steps to insure that any confidential information would not be revealed. R. 314 (¶75) (App A3).

This Respondent also asserted her First Amendment right to try to persuade a landlord not to rent his premises to an abortion clinic. *Id.* (¶77) (App. A3-4).

THE RICO CASE STATEMENT

The Petitioners set forth the full factual underpinnings of their case, subsequent to years of discovery, in their RICO Case Statement.

The "extortion" case against Migliorino can be reduced to eight allegations of purported predicate acts under RICO: (1) "Harassment" of persons at abortion clinics, J.A. 118-119, 121-122; (2) participation in, or organizing of clinic "blockades," J.A. 118-126 (ie. nonviolent sit-ins in front of abortion clinics) including incidents of "clinic invasion," J.A. 118-122 (not defined, but presumably entering into a clinic to advocate against abortion); (3) the wrongful taking of the human remains and (4) the burial of the remains of the aborted babies, J.A. 122-125; (5) causing publicity surrounding the funerals, J.A. 123-125; (6) being "featured as [a] "speaker" at a PLAN conference, J.A. 124; (7) having "Presented petitions signed by building patrons to landlords to threaten them to terminate [a] clinic lease," J.A. 120; and (8) being "associated" as a "volunteer" with PLAL, (Respondent Pro-Life Action League) J.A. 104.

A ninth allegation warrants special note. Throughout all the pleadings in this case, there is not one semblance of an allegation

of violence or threat of violence made directly against Respondent Migliorino. However, Petitioners allege that she was present at a demonstration where there was "destruction of clinic equipment and supplies." J.A. 120. Interestingly, it is stated that this was part of a "clinic blockade by 50 persons," Id. However, this Respondent's link to this event is not described. Presumably, Petitioners concede that she was not even arrested for this incident, as "six" unidentified persons were arrested, but Migliorino was not named as one of them.

This is significant, because Petitioners, elsewhere, do not hesitate to describe Migliorino's arrests: J.A. 118 ("municipal code" violation), J.A. 119, 122-124 (disorderly conduct), J.A. 120 (trespassing and disorderly conduct). No arrests or convictions relating to violence, or property damage are asserted against Migliorino, and no specific claim has ever been made against her that she has engaged in such conduct.

SUMMARY OF THE ARGUMENT

Reading the text of RICO in conjunction with its legislative history, which we believe this Court is compelled to do in light of its previous method of interpreting the statute and its interpretive jurisprudence in the analogous area of antitrust law, this Court should determine that dismissal of the Petitioners' Complaint is warranted.

RICO does not apply to social and political protest activities that are not, as an objective matter, directed toward an economic goal. Because the Petitioners have failed to allege, and after years of discovery they have been unable to assert, that any of the Respondents directed their actions toward financial objectives, they have failed to satisfy that test. This is particularly true with regard to Respondent Migliorino, who was affirmatively alleged to have been a mere "volunteer" in her pro-life activities in opposition to abortion.

In addition, most of the conduct alleged against Migliorino

is presumptively protected under the First Amendment, and as to the remaining allegations, they fail to assert that any of that conduct was directed toward "wrongful" goals, thus precluding a finding of "extortion" under the Hobbs Act, the only RICO predicate asserted by the Petitioners.

Lastly, the Petitioners have failed to assert any valid conspiracy claim against Migliorino under RICO.

This Court should affirm, in its entirety, the Court of Appeals judgment, dismissing the Complaint of the Petitioners.

ARGUMENT

I. THE SEVENTH CIRCUIT DECISION IS CONSISTENT WITH THIS COURT'S METHOD OF RICO CONSTRUCTION

A. Rico Construction Requires Analysis of both Text and Legislative History

The starting point, in determining the scope of RICO's reach, is the language of the text itself *(United States v. Turkette,* 452 U.S. 576, 580 (1981)). While unambiguous statutory language deserves construction according to its "plain meaning" (Id.), this rule is subject to at least two qualifications: First, even a text-bound interpretation must be considered in connection with any "...clearly expressed legislative intent to the contrary" (Id.).

Second, what is, or is not, a "plain meaning" in a statute is not necessarily self-evident. Merely because words used in a statutory sentence are plain in themselves does not necessarily yield a "plain" meaning of the statutory section *(FBI v. Abramson,* 456 U.S. 615, 625 n.7 (1982)). Further, this court has recognized that "[O]f course, there is no errorless test for identifying or recognizing 'plain' or 'unambiguous' language" *(Turkette* at 580).

This court, and its membership have expressed the recog-

nition that some portions of RICO have lacked "plain" meaning, at best, or at worst, were unconstitutionally vague. In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 500 (1985), the Court noted the "failure of Congress and the courts to develop a meaningful concept of 'pattern' (relating to the meaning of "pattern of racketeering activity"). This Court made the same observation in *H.J. Inc. v. Northwestern Bell*, 492 U.S. 229, 236 (1989), and the concurrence in *H.J.* strongly implied that the "pattern of racketeering" element of RICO was unconstitutionally vague (*Id.*, 255-256 Scalia, J. concurring).

Problems of RICO's complexity and any lack of plain meaning is compounded by the unprecedented breadth of the Act. The "expansive uses" of civil RICO (*H.J.* at 492 U.S. 236) and the fact that "...in its private civil version, RICO is evolving into something quite different from the original conception of its enactors" (*Sedima*, 473 U.S. at 499), has been attributed primarily "to the breadth of the predicate offenses..." (*Id.* at 500; *H.J.* 492 U.S. at 236) utilized in RICO.

This breadth creates several concerns requiring particular caution by this court in considering RICO in protest contexts. The broader the attempted purview of a statute, particularly where the conduct proscribed may involve First Amendment activities, the clearer that statutory language must be, and the finer the legislative scalpel should slice between that government regulation which is allowed, and protected First Amendment conduct.

In *N.A.A.C.P v. Button*, 371 U.S. 415, 438 (1963), this Court noted that "[P]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms," and that in First Amendment areas "government may regulate in the area only with narrow specificity," (*Id.* at 371 U.S. 433. Commentators have noted First Amendment abuses under RICO:

"[T]he broad use of civil RICO is eroding areas that

> have traditionally been granted the most careful constitutional protection. Whereas a picketer once was free to express his views so long as he did so nonviolently, today he can be held liable under the racketeering laws for so nebulous and passive an act as inducing fear in the object of his picket." (Note, *Limiting Political Expression by Expanding Racketeering Laws: The Danger of Applying a Commercial Statute in the Political Realm*, 20 Rutgers L.J. 201, 203 (1988)).

Further heightening the need for judicial caution in this case is the fact that RICO contains, even in its civil provisions, "drastic remedies," (including treble damages, and the awarding of costs and attorney's fees (18 U.S.C. § 1964 (c) *(H.J.* at 492 U.S. 233).

It has been noted that "civil RICO's treble damages were meant not to reform or regulate racketeers, but to ruin them," Turley, *Laying Hands on Religious Racketeers: Applying Civil RICO to Fraudulent Religious Solicitation*, 29 Wm. & Mary L. Rev., 481, n.189 (1988), citing: 116 Cong. Rec. 819 (1970) (Remarks of Sen. Scott) (civil RICO's "purpose is to eradicate organized crime in the United States"); *Id.* at 35,199 (remarks of Rep. Rodino) (civil RICO makes "a truly full-scale commitment to destroy the insidious power of organized crime groups"); *Id.* at 35,300 (remarks of Rep. Mayne) (civil RICO's stands for the proposition that organized crime "must be sternly and irrevocably eradicated"), cited in *United States v. Turkette*, 452 U.S. 576, 589 n.11 (1981).

In *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989) this Court raised, but did not decide (citing the lack of "ripeness") the question of whether civil sanctions under RICO were so severe as to be unconstitutional. At a minimum the undisputed severity of these penalties should give this Court pause in deciding the targets at which RICO's artillery will be

aimed, particularly in the context of protest movements directed at political or social reform.

The methodology of RICO interpretation utilized in this case must preserve the proper scope and congressional intent of RICO, while cautiously protecting fundamental constitutional rights. A proper methodology of RICO construction will prevent federal law from being used as a retaliatory weapon in political battles[1], while still preserving its use in conformity with Congress' original intent to bring against all multi-faceted forms of organized crime, "the pressure of private attorneys general' on a serious national problem, for which public prosecutorial resources [were deemed inadequate]," *(Agency Holding Corporation v. Malley-Duff & Assocs., 483 U.S. 143, 151 (1987)* cited in *Holmes v. SIPC, ___ U.S. ___, 112 S.Ct. 1311, 1323, (1992)* (O'Connor, J. concurring). No clear, expressed answer to the question presented by the granting of certiorari in this case can be produced by a cursory examination of the statutory language, any more than there could have been a purely textual answer to the question presented in *Holmes v. SIPC,* ___ U.S. ___ 112 S.Ct. 1311 (1992) where this Court determined that the petitioner lacked standing to bring a RICO civil suit, based on concepts of proximate causation. Proximate cause was nowhere to be found in the *explicit* text of the statute, although it was

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[1] One commentator, referencing the use of RICO against pro-life activists, has noted that:

> "At least until (or if) the final death knell sounds for *Roe v. Wade*, or civil RICO is significantly changed, it is likely that civil RICO will offer the most potent legal weapon in the reproductive rights arsenal." Yonover, *Fighting Fire With Fire: Civil RICO and Anti-Abortion Activists*, 12 Women's Rights Law Reporter 155 (1990)

That commentator noted that "the escalation of civil RICO litigation is hardly surprising. RICO provides some extraordinary 'carrots' for plaintiffs: recovery of treble damages, costs, reasonable attorney's fees, availability of federal jurisdiction, and the possibility of nation-wide service of process." (*Id.* at 157) (footnotes omitted).

found to have been presuppositional and implicit in the RICO text defining those persons who could bring RICO lawsuits in 18 U.S.C. § 1964 (c).

RICO neither expressly contains language broadening its scope to include non-financially motivated political and social activists, nor does it, by its express language, exclude such persons.

Plaintiffs incant the "liberal construction" directive of RICO, apparently as the *fait accompli* of their arguments for an overliberalized construction of RICO. (Br. 19). However, Petitioners confuse liberal construction with license for statutory novelty. Speaking of the "liberal construction" clause, this Court recently noted:

> "[T]his clause obviously seeks to insure that Congress' intent is not frustrated by an overly narrow reading of the statute, but it is not an invitation to apply RICO to new purposes that Congress never intended." *(Reves, et al. v. Ernst & Young*, ___ U.S. ___, 113 S.Ct. 1163, (1993)).

Liberal construction will not justify hobbling the remedial purpose of RICO by opening the door to massive and complex damages litigation which would not only burden the Courts, but would undermine the effectiveness of treble damages suits *(Holmes, Supra)*.

While we believe that respondents' interpretation of RICO, construing it to include the requirement that RICO "extortion" be directed at an economic goal, is superior to Petitioners' theory, nevertheless, even if we were to concede (arguendo) that Petitioner's interpretation is "equally plausible", we believe that resort to legislative history of RICO is necessary, together with construction of its textual terms, in order to resolve the question presented by this case. Where, "on the face of the statute" there are two "equally plausible" constructions of the statute (*FBI* at

456 U.S. 624), this Court should select that construction that "more accurately reflects the intention of Congress, is more consistent with the structure of the Act, and more fully serves the purposes of the statute." (*Id.* at 625).

This Court has not hesitated, on repeated occasions, to refer to the "legislative history" of RICO in construing a wide variety of questions presented to it (*Sedima* at 473 U.S. 486-488; *Holmes* at 112 S.Ct 1316-1318; *Turkette* at 452 U.S. 588-593; *H.J.* at 492 U.S. 236, 239-240). This case presents another such occasion. We believe that because there is no clear, express answer on the face of the text of RICO itself, to the issue presented for certiorari, and because, at best, Petitioners' interpretation of RICO is only as (if not less) "equally plausible" as Respondents, this Court must consider, in addition to the text, the legislative history of RICO in arriving at an answer.

B. Evidence for an economic requirement in RICO is found in the structure of the text

The definition of "person" is a key element in the RICO scheme. "Person" is referred to with regard to potential plaintiffs in § 1964 (c). "Person" is also utilized when referring to potential defendants (§ (a)-(d). The definition of "person" under RICO is inherently and necessarily linked to the overriding presumption that the wrongs suffered by potential plaintiffs under RICO, and occasioned by the conduct of potential defendants under RICO, have to do with economically directed conduct.

"Person" in RICO is defined, for all purposes, as "any individual or entity capable of holding a legal or beneficial interest in property." (§ 1961 (3)). There is no reason for Congress to have included a specific definition of both potential plaintiffs and potential defendants that *required* the capacity to hold legal or beneficial property rights if RICO had been intended to extend to non-economic conduct. Clearly, the scope of RICO was intended to reach only those "persons" whose

conduct was intrinsically tied to property interests and economic goals.

The categorization of potential RICO plaintiffs under § 1964 (c) also gives us a clue that RICO is structured for, and designed against, only economically directed conduct. § 1964 (c) allows for recovery in civil actions for "any person injured in his *business or property...*" (emphasis added). Lawsuits for purely personal, physical or emotional damages or other intangible interests are not permitted by the language of § 1964 (c). This is another strong indication that RICO was not designed for activities of the type alleged in Petitioners' complaint.

Further, the use of "enterprise" in §§ 1962 (a) and 1962 (b), "clearly refers to the sort of entity in which funds can be invested and a property interest of some sort acquired, and hence the sort of entity which one joins to make money" *(U.S. v Ivic,* 700 F.2d 51, 60 (2nd Cir. 1983)). The Court in *Ivic* rightly applied the rule of statutory construction that where the same word is used in the same section more than once, and the meaning is clear in one place, the same meaning should be applied in the other places (*Id.*), thus concluding that an economic presumption underlying the concept of "enterprise" in § 1962 (a) should be equally applicable to civil RICO actions under § 1962 (c) where the economic aspect of "enterprise" is not quite as textually clear.

C. The legislative history of RICO clearly indicates that the social activism of the Respondents in this case is outside of the scope of RICO

This Court has avoided interpretations of RICO that would be "inconsistent with Congress' underlying policy concerns" (*Sedima,* 473 U.S. at 493).

It is without dispute that Congress had no intention to focus the heavy litigation artillery of RICO at conduct aimed at social or political reform. This court has recognized that:

> "To be sure, Congress focused on, and the examples used in the debates and reports to illustrate the act's operation concern, the predations of mobsters. Organized crime was, without a doubt, Congress' major target as we have recognized elsewhere." *(H.J.* at 492 U.S. at 245) (citations omitted)."

While it is one thing for this Court to eschew limiting the application of RICO to organized crime, though organized crime was its "focus" (*Id.* at 248), it is quite another thing to say that the presumption that underlaid RICO that the crimes within its scope were economic crimes should have no limiting function.

While this Court has repeatedly indicated that it would not add any additional elements not found within the text or statutory history of RICO (eg. *Sedima* and *Turkette*), it has defined elements of proof implicit in RICO that arguably add elements of proof to the RICO scheme (to wit: *H.J.* with regard to the non-statutory elements of "continuity" and "relationship" found to be implicit in the definition of "pattern of racketeering"; and *Holmes*, where this Court imputed to the statutory language of "by reason of" (in § 1964 (c)), the elements of proximate causation requiring some proximate causation relationship between the conduct of the defendant and the injury to the plaintiff, in order to create RICO liability).

D. Conclusion

This Court has avoided adding elements of proof to RICO where such additional elements were inconsistent with the text and legislative history of the Act. It has, nevertheless, construed RICO to include limitations on its scope where such limitations were consistent with its purposes, and particularly where clued by some "positive sign" in its language or legislative history (*Turkette* 452 U.S. at 593). Here, we have strong evidence for both.

II. REQUIRING THAT CONDUCT UNDER RICO BE ECONOMICALLY DIRECTED IS CONSISTENT WITH THIS COURT'S TREATMENT OF ANALOGOUS LAW

A. The Analogy to Antitrust Law

The analogy between RICO and Antitrust law was noted in *Holmes*, *Supra* 112 S.Ct. at 1317 where this Court observed that Congress modeled § 1964 (c) of RICO (relating to treble damages, attorneys' fees and costs) and the standing requirements of plaintiffs after § 4 of the Clayton Act, which entitled recovery to anyone who "shall be injured in his business or property by reason of...the wrongful conduct". In *Holmes*, this Court held that the very same "reasons that supported conforming Clayton Act causation to the general tendency [of the law to limit damages to direct, rather than remote causes] applied just as readily" to RICO (*Holmes* at 1320). Petitioners have conceded the close parallel between RICO and antitrust laws. (Br. Pet. 35 n.27)

Accordingly, just as proximate causation principles which had been found to apply as a limitation on the scope of antitrust were applied to RICO, so too, exemptions regarding conduct directed at social and political reform under *N.A.A.C.P. v. Claiborne Hardware Inc.* 458 U.S. 886 (1982) and *Eastern Railroad President's Conference v. Noerr Motor Freight, Inc.* 365 U.S. 127 (1961) should be similarly applied to RICO. This Court has also recognized the analogy between antitrust law and RICO in *Sedima*. In that case, relying heavily on the analogy between RICO and predecessor antitrust laws, this Court found that the "clearest current" of legislative history flowing through the enactment of RICO showed a reliance by Congress on the Clayton Act, in separating government prosecutions from civil actions under RICO (*Sedima* at 489). Utilizing the analogy to antitrust, this Court in both *Holmes* and *Sedima* made substantive law determinations with regard to the patterns of liability

that would be cognizable under RICO. So too, in this case, in recognition of the analogy between antitrust law and RICO, this Court should apply similar exemptions protecting social and political reform activism from the scope of this broadly sweeping law.

B. The Political/Social Conduct Exemption Under the Sherman Act Should Apply Similarly to RICO.

The Sherman Act has been construed very broadly (*Goldfarb v. Virginia State Bar*, 421 U.S. 773, 787 (1975)). Yet, despite the breadth of the application and construction of the Sherman Act, logical limitations have been imposed on its scope (*Summit Health, Ltd. v. Pinhas*, ___ U.S.___, 111 S.Ct. 1842, 1846 n.10 (1991)).

One of those limitations is in the nature of an antitrust exemption for social/political activism.

In *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) (cited by the 7th Circuit decision in our case, *National Organization For Women v. Scheidler*, 968 F.2d 612, 617 (7th Cir. 1992)), this Court held that the Sherman Act did not apply to employees engaged in a violent sit-down strike in which numerous state law felonies were committed and which resulted in shutting down a company which produced a large percentage of the nation's hosiery. Among the illegal acts of the union members were the changing of locks and destruction of property and equipment, resulting in the plant being shut down for some two months after the Plaintiff regained possession (*Id.* at 482). The purpose of the union action was to force the Plaintiff company into hiring only union employees (*Id.* at 482). The Supreme Court held that wrongful conduct, if it is to be swept within the scope of the Sherman Act, "must be aimed or directed at the kind of restraint which the Act prohibits or that such restraint is the natural and probable consequences [sic] of the conspiracy" (*Id.* at 511, citing *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 471 (1922)).

Similarly, we believe that RICO should only apply to conduct which is "aimed or directed at" an economic or business goal as a result of enumerated predicate acts, or where commission of such predicate acts creates as a "natural and probable consequence" the type of economic harm sought to be avoided by Congress.

The Court in *Apex* emphasized that wrongful acts not within the intended reach of the Act "are not brought within its sweep merely because, without other differences, they are attended by violence" *(Apex* at 513).

Similarly, despite the broad and vitriolic characterizations by Petitioners, the egregious conduct alleged against the Respondents (Br. 4-7) is insufficient, in itself, to confer RICO liability based on the Respondents' activities as a whole, much less on the benign and non-violent conduct of Monica Migliorino.

In *N.A.A.C.P v. Claiborne Hardware Co.,* 458 U.S. 886 (1982), the Court recognized that boycotts organized by black citizens against white merchants, which were sometimes attended by violence and property destruction, were beyond the reach of the state versions of the Sherman Act (*Id.* at 913). One of the keys to *N.A.A.C.P.*, (and, we believe, an analytic key by which this court can unlock the answer to the question presented for certiorari), is the recognition in *N.A.A.C.P.* that:

> "While states have broad power to regulate economic activity, we do not find a comparable right to prohibit peaceful political activity such as that found in the boycott in this case. This Court has recognized that expression on public issues 'has always rested on the highest rung of the hierarchy of First Amendment values'...[S]peech concerning public affairs is more than self-expression; it is the essence of self-government...There is a 'profound national commitment' to the principle that 'debate on public

issues should be uninhibited, robust, and wide open'"
(*Id.* at 913) (ellipses added, citations omitted).

The recognition in *N.A.A.C.P.* that while the states have broad power to "regulate *economic* activity" they do not have a comparably broad right to regulate non-economically directed conduct aimed at social or political reform, applies with equal force to the enforcement of federal laws. The Court in *N.A.A.C.P.* further indicated, relative to First Amendment rights, that "we cannot of course lightly impute to Congress an intent to invade those freedoms," (*Id.*) citing *Eastern Railroad President's Conference v. Noerr Motor Freight*, 365 U.S. 127 at 137-138 (1961). In *Eastern Railroad President's Conference* this Court exempted from the Sherman Act a false publicity campaign waged by railroads against the trucking industry intended to foster the adoption of laws destructive of the trucking business.

Respondent Migliorino is charged with eight categories of conduct which allegedly form a basis for her RICO liability in this case. None of this conduct was directed or aimed primarily at an economic goal. Five of the categories involved: (1) giving humane burial to the human remains resulting from abortion, (2) publicizing those burials of aborted babies, (3) participating as a speaker in a PLAN convention, (4) presenting petitions by tenants to a landlord in an attempt to induce the landlord not to rent his building space to an abortion clinic, and finally, (5) having been "associated" with PLAL as a "volunteer", all presumptive First Amendment activities that fall outside of the scope of RICO.

As to the other three categories of wrongdoing alleged against Respondent Migliorino not necessarily protected by the First Amendment on a *presumptive basis*, these are limited to allegations of: (1) The taking of human remains, characterized by Petitioners as the crossing of state lines "to wrongfully take fetal remains from Vital-Med"; (2) "Harassment" of persons outside of clinics (a term not defined by Petitioners); (3) Various

acts of "clinic blockade" either personally, or through her alleged help in organizing those blockades, including the vague assertion of clinic "invasions" (see our Statement of the Case at 6).

In addition to the fact that none of these alleged wrongful acts constitute extortion under the Hobbs Act, which is the only predicate alleged by the Plaintiffs supporting their RICO claims (see further argument at 32-38 of this brief), such allegations are similar to the allegations in *Apex Hosiery* and *N.A.A.C.P.*[2] None of the allegations against Respondent Migliorino assert acts of violence of any kind by her. Migliorino's abortion opposition is non-violent, non-economic and morally based. It should be held to lie outside the scope of RICO in the same way that the conduct of the protestors and activists was held to lie outside of anti-trust laws in *Apex* and *N.A.A.C.P.*

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[2] While the Court in *N.A.A.C.P.* did indicate that "the First Amendment does not protect violence", it further noted that "while the state legitimately may impose damage for the consequences of *violent* conduct, it may not award compensation for the consequences of *non-violent*, protected activity. Only those losses proximately caused by the unlawful conduct may be recovered" (*N.A.A.C.P.* at 918, emphasis added). The Court also noted the requirements of "precision of regulation" in separating and dividing those damages proximately caused by clear proof of violent, unlawful activity as opposed to protected activity. (Id.)

III. EXCLUDING THE CONDUCT OF THIS RESPONDENT FROM RICO WILL PROTECT IMPORTANT FIRST AMENDMENT PRINCIPLES

A. Most of the alleged wrongful conduct of Respondent Migliorino is presumptively protected under the First Amendment.

1. PETITIONING THE LANDLORD

Migliorino is alleged to have committed the predicate act of extortion, underlying the RICO claim under § 1962 (c), by reason of having "presented petitions signed by building patrons to landlords to threaten them to terminate clinic leases" in 1986 in Milwaukee, Wisconsin (RICO Case Statement, Exh. A. J.A. 120). This activity is described in the Complaint as "...Migliorino sent letter directly to the landlord and to other tenants, threatening disruption and harassment if Summit [abortion clinic] were allowed to move in to the building." (Complaint, ¶77, J.A. 61)

Petitioners do not define "disruption" and "harassment". This is significant, because disruption and harassment are, like so many other aspects of the abortion controversy, a function of the perspective of the viewer of the demonstration in question. The fact that Petitioners would assert that "threatening disruption and harassment" at the site of an abortion clinic constitutes extortion as a predicate act for RICO liability shows the great lengths to which the Petitioners are willing to stretch the scope of RICO beyond any recognizable form, shape or substance. It is clear, however, that what Petitioners mean here, is that Migliorino's communication to the building tenants (which in turn caused them to object to the Landlord about the abortion clinic) warned that events such as "weekly pickets" and encounters with "sidewalk counselors" and even "sit-ins", together with "press coverage" would likely become a reality if the abortion clinic re-located into the building (J.A. 77, ¶125).

Petitioners then, denominate this communication as a threat of "harassment". "Harassment" unfortunately suffers the semantical fate of perpetual re-definition with every wind of change in the prevailing climate of popular opinion. One citizen's "harassment" may be another's mere trifling annoyance. Yet it is "[a] function of free speech...to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *(Terminiello v. Chicago,* 337 U.S. 1, 4 (1949)).

Official regulation of expression is unconstitutional, even though it is intended only to restrict disorderly conduct or "fighting words", where its effect is to allow punishment for expressive conduct that is simply annoying or offensive. *(Houston v. Hill,* 482 U.S. 451 (1987); *R.A.V. v. City of St. Paul,* ___ U.S. ___ 112 S.Ct. 2538, 2560 (1992) (White, J., concurring)).

Significantly, Petitioners do not allege Migliorino ever "threatened" force or violence against any clinic or any clinic personnel. Thus, Petitioners would have this Court impose the awesome remedies of RICO against a pro-life activist who tells a landlord of a building that if an abortion clinic moves into the building, that there will probably be pickets, perhaps blockades, the presence of police officers, and a high visibility of news coverage. Can Petitioners seriously argue that such conduct does not implicate the First Amendment?

Even if Petitioners' Complaint did allege that Migliorino used a threat of force (which, after many years of litigation, amendments to the Complaint and a voluminous RICO case statement, is an assertion that Petitioners have never specifically made against Migliorino), unless it can be shown consistent with the face of the pleadings that Migliorino used "[a]dvocacy [that was] directed to inciting or producing imminent lawless action and is likely to incite or produce such action" *(Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969)) such advocacy (even if couched

in terms of a "threatening" exhortation) may not be sanctioned under force of law. It is clear that after asserting presumptively protected First Amendment advocacy on the part of Migliorino, Petitioners have failed to provide any explanation as to how such conduct can be penalized without affronting guarantees of free speech.

Nor is the fact that Migliorino is alleged to have used "threats" of disruption and harassment determinative of protection under the First Amendment. As the Court stated in *N.A.A.C.P.* (Supra):

> "The claim that the expressions were intended to exercise a coercive impact [on the injured party] does not remove them from the reach of the First Amendment" (*Id.* at 910-911, quoting from *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971)).

We would submit that the "threat" of generalized disruption and harassment that attends most abortion clinics, given the present social and political realities of abortion as the most divisive public issue of the last two decades (*Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, 3079 (1989) Blackmun, J., dissenting and concurring in part), is analogous to "threats" of the same kind of harassment and disruption secondarily caused by boycotts which were considered protected First Amendment activity in *N.A.A.C.P.*

2. ADVOCACY ACTIVITIES

The second category of presumptively protected First Amendment conduct which Petitioners attempt to sweep within the purview of RICO is Migliorino's alleged activities in having "traveled throughout the country leading efforts to shut down women's health centers such as DWHO and Summit and encouraging the use of unlawful methods to do so." (J.A. 4 Complaint, ¶30). However, mere advocacy of the positions that abortion clinics should be "shut down", even to the extent of

"encouraging others to do so", is still presumptively protected under the First Amendment, unless it fails the "clear and present danger" test *(Brandenburg, Supra)*. As the Seventh Circuit indicated in this case:

> "Finally, selling materials advocating a particular viewpoint, even if the materials advocate illegal actions, is not a predicate racketeering activity. Therefore, income derived from the sales is not income derived from racketeering activity. Moreover, unless the materials violate the "clear and present danger" test, the distribution is protected by the First Amendment. *Cf. Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940)." (968 F.2d at 630)

The second example of advocacy alleged as a basis for RICO liability of Migliorino is the fact that she and other Respondents "were speakers at a convention of the Pro-Life Action Network (PLAN) (J.A. 54-55, Complaint, ¶55;). That any liability of Migliorino, posited merely because she was a speaker at a convention sponsored by PLAN, is subject to (and is protected under) the "clear and present danger" rule above cited, would appear to be almost too obvious for elaboration.

The third example of Migliorino's advocacy of her pro-life position being used as a grounds for RICO liability is the assertion that she "publicized possession of fetal remains taken from Vital-Med" (J.A. 123-125).

With regard to this assertion, we are reminded of the Court's comments in *Town of West Hartford v. Operation Rescue*, 915 F.2d 92 (2nd Cir. 1990). In that case, the Court rejected the town of West Hartford's attempt to utilize RICO (and Hobbs Act extortion) against pro-life protestors. One of the allegations of "extortion is that the Defendants had publicized allegations of police brutality against them while being arrested during pro-life activities and blockades outside of abortion clinics. Specifically, the Complaint alleged that several of the

Defendants "deliberately and maliciously sought to extort a less diligent response to future protests by falsely indicating to newspaper reporters that the West Hartford police department had beaten protestors with clubs." (*Id.* at 96). The Court noted:

> "We also note the First Amendment implications of any ruling, that, for example, the publication of a paid advertisement alleging police brutality (See complaint Para. 80) violates a federal statute which defines a felony punishable by twenty years imprisonment..." (*Id.* at 102).

Beyond even the obvious First Amendment protections for Migliorino's publicizing the fact that unborn babies had been aborted and were being buried ceremoniously and humanely, is that Petitioners have recklessly argued that "the Defendants..threatened to disclose publicly the identities of the women who conceived the fetuses." (Br. Pet. 6). None of the pleadings in this case make any such allegation.

The Complaint alleges, rather, that Migliorino stated her intention to, and in fact did, release the names of abortion clinics from which the aborted babies had come. (J.A. 59 ¶71, 72).

To state, however, that such communications by Migliorino constituted "extortion" is simply and purely nonsense. That abortions occurred, and that human fetuses were aborted at the Petitioners' clinics is a tautology. To further link the aborted babies that were being buried with those clinics should have created no more "fear" to the Petitioners under the Hobbs Act than stating that the aborted babies from the Petitioners' clinics were being disposed of by a waste disposal service.

Nowhere in the Complaint or the RICO Case Statement is the assertion made that Migliorino ever directly or impliedly threatened to release the names of mothers who had abortions,

and in any event the implication is flatly denied by Migliorino's Answer (App. A3).

The only statement in any of the pleadings even relating to identity of mothers is the allegation that Respondent Scheidler "was widely quoted as saying" that the aborted remains were "individually packaged and labeled..with the names of the mothers, doctors, dates and places the abortions were performed." (J.A. 59 ¶70). Somehow, Petitioners believe such an assertion can, fancifully, be transformed into "an obvious threat to women...that their privacy would be invaded and the confidentiality of their treatment breached by having their names and personal medical information revealed publicly" (J.A. 60 ¶75).

3. ASSOCIATIONAL RIGHTS

The third category of presumptive First Amendment activity which Petitioners allege against Migliorino as a basis of RICO liability is the assertion that she was "associated with PLAL as a volunteer in PLAL-approved and PLAL-sponsored activities" (J.A. 104). Petitioners further allege that Migliorino was part of the PLAN enterprise (J.A. 100). However, the Petitioners fail to outline what Migliorino's actual association with PLAN was, other than the multiplistic allegation that "PLAN has functioned through annual meetings in which Scheidler, Scholberg, Murphy, Terry, *Migliorino* and co-conspirator Ryan have participated as organizers, leaders and/or speakers..." (J.A. 101) (emphasis added).

If Petitioners intent in making these multiple and vague allegations is to obfuscate the nature of the participation of Respondents such as Migliorino, they have surely succeeded.

However, by matching the above reference taken from the RICO Case Statement with the specific allegations against Migliorino in the Petitioners' Complaint, we see that Migliorino's *only* involvement with PLAN was as a speaker.

Petitioner's Complaint alleges that Migliorino's only specific association with PLAN was from August 25 through August 27, 1988, where she "took part" in a PLAL-sponsored PLAN convention in Chicago, Illinois. (J.A. 54). It is alleged that other Respondents "and Migliorino were speakers." (*Id.*). Thus, the sole and single specific allegation connecting Migliorino with the PLAN enterprise is a general associational reference in the RICO Case Statement, which is only elucidated by the allegations in the Complaint that she was a speaker at one of their conventions. Migliorino's involvement with regard to the retrieval, burial and publicity of fetal remains (J.A. 57-59) and her conduct in petitioning a landlord against leasing building space to an abortion clinic (J.A. 61) are not tied in any manner to the activities or affairs of the PLAN enterprise, but are solely attributed to the individual conduct of Migliorino. All of the other activities in creating the PLAN enterprise (J.A. 49-53) specifically exclude Migliorino. Furthermore, the "carrying out" of PLAN's agenda, including the activities of Operation Rescue (J.A. 55-57) also exclude Migliorino.

Of course, this Court has clearly indicated that RICO may not be used to sue outside consultants (accountants, lawyers, etc.) who commit fraud for a business enterprise if they did not personally participate in the management or operation of that business enterprise (*Reves v. Ernst & Young*, ___ U.S. ___, 113 S.Ct 1163 (1993)).

Thus, if Petitioners are still asserting RICO liability against Migliorino with reference to the PLAN enterprise (which they obviously are) they must be asserting that her activities as a speaker at a PLAN convention constitute sufficient management of the affairs of the enterprise to impose liability.

Not only is that assertion out of step with *Reves*, but it ignores the presumptive First Amendment protection Migliorino enjoys under the "clear and present danger" line of cases (eg. *Brandenburg v. Ohio, etc.*).

The jurisprudence of this Court regarding the freedom of association under the First Amendment does not comport with Petitioners' theory. "The First Amendment similarly restricts the ability...to impose liability on an individual solely because of his association with another" *(N.A.A.C.P., Supra,* at 919) (citations omitted). In order "to punish association" with a group that has illegal aims "there must be 'clear proof that a Defendant specifically intend[s] to accomplish [the aims of the organization] by resort to violence.'"; and such intent must be judged only by the "strictest law" so as to protect those who, while associating with an organization that has unlawful aims, wishes to limit his or her association to the lawful aims of that organization *(Id.)* (citations omitted).

There is a complete and total absence of any allegations in this case that Migliorino has any intent to accomplish the aims of any organization (including PLAN) by a resort to physical violence or force. Her only connection with PLAN having been her activity as a speaker in a convention, Migliorino's alleged connections with the PLAN enterprise is insufficient to predicate any RICO liability in this case.

4. THE BURIALS

The fourth type of conduct alleged as a RICO predicate which is presumptively protected under First Amendment principles are the assertions relating to Respondent Migliorino having arranged the burial ceremonies for aborted babies whose remains were retrieved from the Vital-Med loading dock.[3]

Petitioners have apparently retreated from the position clearly outlined in their Complaint: that the funeral ceremonies

[3] Plaintiffs assert that Migliorino and other Respondents "stole" more than 4,000 aborted remains from the Vital-Med laboratory loading dock where they were prepared for pick-up and ultimate disposal in trash and waste disposal sites (Br.Pet.6). The *manner* of the retrieval will be covered in later arguments in this brief regarding the lack of proof that extortion took place under the Hobbs Act with regard to any of Migliorino's activities.

conducted by Migliorino of the remains of aborted babies were somehow (incredibly) an act of extortion, thus imposing RICO liability. We could, of course, speculate that such a retreat may have been precipitated by the embarrassing recognition that this single body of allegations, perhaps more than any other aspect of the case, exposes, *reductio ad absurdum*, the outer limits of Petitioners' leap from logic.

Petitioners have asserted in their RICO Case Statement that Migliorino "engaged in a pattern of extortionate activities" which served as a predicate for RICO liability in that, among other things, she was involved in "the unlawful taking and parading of fetal remains..." (J.A. 88). It is further alleged that extortion was committed by "storage, transportation, and disposal of fetal remains taken illegally..." (J.A. 95).

Finally, Petitioners, in their RICO Case Statement, allege that "those who have unlawfully taken fetal remains and stored, transported and disposed of those remains have done so as part of the conspiracy to deprive clinics, patients, clinic personnel, and doctors of their respective rights to provide and receive abortions." (J.A. 97).

Migliorino is singularly alleged to have developed a "plan to steal and then publicize the stolen fetal remains" (J.A. 61, ¶77). Migliorino is alleged to have retrieved the aborted remains (J.A. 58 ¶66-68) and to have "arranged a September 10, 1988 ceremony and burial for a reported 1,200 fetuses." (J.A. 59, ¶71).

In response to Petitioners' Complaint (*Id.*) Migliorino, in her Answer to Second Amended Complaint (J.A. 21 App. A1-4) affirmatively conceded that she arranged funeral rites and burial of many unborn children killed in abortion. (R.314 App. A4). She further stated affirmatively that "Insofar as Defendant Monica Migliorino (Miller) participated in the handling, funeral rites and burial of the unborn victims of abortion, she did so motivated by her religious belief, and in the context of religious worship, believing that such funeral rites and burials were an act

of charity and a work of mercy, affording such unborn victims a measure of recognition of individual worth and dignity." (*Id.*, App. A4).

Significantly, Petitioners, in their own allegations in the Complaint, set forth the presumptively religious nature of Migliorino's act in having "arranged a...*ceremony* and burial..." (J.A. 59, ¶71), and funeral "masses" (J.A. 69 ¶98j).

The primary dictionary definition of "ceremony" includes the reference to "religious rite" *(Webster's New World Dictionary*, 1968), and "masses" are thoroughly religious in nature (*Id.*).

The concept of *"burial"* has historically religious implications under the common law. Traditionally, "the leaving unburied the corpse of a person for whom the Defendant is bound to provide Christian burial, as a wife or child, is an indictable misdemeanor, if he is shown to have been of ability to provide such burial. 2 Den. Cr. Cas. 325." *(Bouvier's Law Dictionary*, 1940).[4]

That Petitioners have targeted the religious rites performed

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[4] "Both burial and cremation were widespread practices at various dates and places in antiquity . . . In the Semitic East burial was always predominant. In Asia Minor the tomb was conceived as the eternal house of the dead . . . The practices of later Judaism were closely based upon the OT and early custom. . . Scrupulous care was taken to let none be unburied (Josephus, *contra Apionem* 2, 29, 211 etc.)" 1 *Dictionary of the New Testament Theology*, Bury, 264 (1981).

Nor, does Migliorino's protection under the Free Exercise Clause of the First Amendment cease for these burials solely because she was not related by blood to the tiny corpses that she was burying. Under the theology of Migliorino's tradition, "it was deemed a good work to make special provision for the burial of strangers...(Matt. 27:8)" (*Id.* at 265). Her Catholic doctrine teaches that "The corpses of human embryos and fetuses, whether they have been deliberately aborted or not, must be respected just as the remains of other human beings." (*Instruction on Respect for Human Life in its Origin and on the Dignity of Procreation*, Congregation for the Doctrine of the Faith, St. Paul Editions, pg. 18, Feb 22, 1987).

by Migliorino as an act of "extortion" signals that Petitioners are guilty of "an attempt to disfavor [Migliorino's] religion because of the religious ceremonies it commands..." *(Church of the Lukumi Babalui Aye, Inc. v. City of Hialeah*, ___ U.S. ___, 113 S Ct. 2217 (1993))

Like the Petitioners' reference to Migliorino's conducting of burial "ceremonies" and "masses", the use of the words "sacrifice" and "ritual" in the *City of Hialeah* ordinance was "consistent with the claim of facial discrimination" against practitioners of a religious group. (*Id.*).

That the Petitioners target a religious ceremony conducted by Migliorino and characterize it as an act of extortion shows how far the Petitioners will go in attempting to stretch RICO beyond any recognizable limit. Migliorino's concern for the aborted dead is understandable also, in light of the undignified and in some cases outrageous, handling of human remains as the result of abortions which has been documented.[5]

Finally, Petitioners argument that the activities of Migliorino in having arranged for the human aborted remains to have been "given local burial amidst a media campaign designed to generate negative publicity for women's health clinics generally and for affiliates of DWHO and Summit, specifically," (J.A. 60, Complaint, 73) is similar to the argument of Planned Parenthood, which was rejected by the 8th Circuit Court of Appeals in *Planned Parenthood of Minnesota, et al. v. State of*

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[5] Several dozen aborted babies were discovered in a garbage dumpster behind a Milwaukee abortion clinic. When asked by police who were called to the scene what they were doing, the children who discovered the aborted babies in the dumpster innocently indicated that they had been playing with the "little people." (Migliorino, *Report from Rat's Alley: Down and Out With the Unborn In Chicago and Milwaukee*, Fidelity (July-August, 1987)).

One report from Associated Press indicated that two passers-by had discovered 173 "partially burned fetuses" in a field formerly owned by a doctor *(Los Angeles Times*, April 16, 1992, A-24).

Minnesota, et al, 910 F.2d 479 (8th Cir. 1990). In that case, Planned Parenthood attempted to strike down as unconstitutional, the Minnesota Fetal Disposition Law, Minn. Stat § 145.1621 (1988). One of the arguments advanced, and the response by the Court, are noted as follows:

> "We also do not accept Planned Parenthood's argument that the statute creates an impermissible psychological burden by equating abortion with murder...Planned Parenthood's argument that the state's conclusion that fetal remains are the equivalent of human remains is also unavailing. We cannot agree that the Minnesota legislature intended to convey meaning beyond acceptance of common terms. However, even assuming this is a true purpose, we do not find it to be an invalid purpose. A state may make a value judgement favoring childbirth over abortion. *See Webster*, 109 S.Ct. at 3050." *(Id.* at 478-489).

While Migliorino's conduct in providing honorable burial for the aborted human remains offends the sensibilities of Petitioners, it is incomprehensible to believe that such acts extorted anyone's rights, causing injury to "business or property" under RICO.

IV. PETITIONERS HAVE FAILED TO SHOW THAT MIGLIORINO COMMITTED EXTORTION THROUGH THE "WRONGFUL" USE OF FEAR UNDER THE HOBBS ACT

A. The Reasoning in *U.S. v. Enmons* Should Apply to this Case

The only predicate acts that the Respondents are alleged to have committed are those acts that Petitioners contend are in violation of the Hobbs Act. J.A.66 (Complaint ¶97). In their RICO Case Statement, Petitioners unambiguously state that "These acts violate the Hobbs Act, 18 U.S.C. § 1951." J.A.91.

While Amicus Curiae, United States, contends that the pleadings in this case set forth acts of "bombings" and "arson," (Br. 21) as predicate offenses, not even the Petitioners have made that claim prior to the entrance of United States into this case. Of course it does not bear repeating more than once that Migliorino has never in any way been implicated in those allegations. Nevertheless, the fact that a new type of predicate offense is set forth for the first time in the brief of Amicus Curiae is testimony to the all too obvious lack of substance in Petitioners' claim that RICO liability accrues to Respondents under the Hobbs Act.

We would submit that this Court should reaffirm the construction given, in *U.S. v. Enmons*, 410 U.S. 396 (1976), to the term "wrongful" as it is used in the Hobbs Act.

That Act defines "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear..." 18 U.S.C. § 1951(b)[2].

In *Enmons* this Court held that "wrongful" must apply not only to the means used by the defendant to perform the acts in question, but also to the objectives and goals sought to be advanced by the conduct.

The aggravated conduct of the defendants in *Enmons* eclipses any of the actions of Migliorino or the other Respondents in this case. In *Enmons*, the defendant union members and officials were charged with a series of acts of deliberate violence, including the firing of high-powered rifles and blowing up property owned by the employer, during the course of a labor dispute (*Id.* at 410 U.S. 398).

This Court held that, in contradistinction to situations where the Hobbs Act clearly applies, such as where union members use the threat of force to extort illegal "personal payoffs" from employers, rather, the use of illegal means in an

attempt to "achieve legitimate union objectives" was excluded from the Hobbs Act because the benefits that were the ostensible goal (ie. increased employment benefits) were not "wrongful" in and of themselves (*Id.* at 399-401).

This construction of "wrongful," which was derived from "the face of the statute," was said to have avoided the Government's "interpretation of the [Hobbs] Act [which] slights the wording of the statute that proscribes obtaining property only by the wrongful use of actual or threatened force, violence, or fear" (*Id.* at 399).

The overriding goal of the Respondents, the eradication of abortion in America, is an admittedly valid moral and social objective. As this Court recently observed: "Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of or condescension toward (or indeed any view at all concerning) women as a class..." (*Bray et al. v. Alexandria Women's Health Clinic et al.*, 506 U.S. ___, (slip op.), 113 S.Ct. 753 (1993).

Just as it was determined in *Bray* that the objective "aimed at" by abortion protestors was not the ill treatment of women, but rather the eradication of abortion, *(Id.)* so too, in this case, the objective of the Respondents, and of course Migliorino, is not to preempt the health clinic market, but rather, to stop abortion. It would matter little to the Respondents if the abortion clinics were to make the unlikely decision to give away abortions for free. Respondents would still have taken an activist role in trying to prevent them from occurring, because their goal is not to extract illegal economic benefits from the Petitioner-clinics, but to stop certain social conduct that they view to be morally intolerable.

Because Migliorino, and all the Respondents for that matter, had, as their undisputed goal, the eradication of abortion as a social phenomena, the mere alleged illegality of the means that they used toward that goal is not enough to constitute the

"wrongful" obtaining of property through actual or threatened use of force or fear under the Hobbs Act, as that term has been construed by this Court. Thus, the Petitioners have failed to show any conceivable set of predicate acts that support their RICO claims.

B. Considerations of Federalism in *Enmons* Make it Applicable to this Case.

In addition to the fact that *Enmons* is true to the text of the Hobbs Act, however, there is an further reason why its application to this case is particularly compelling. Here, as in *Enmons*, considerations of federalism dictate the nonapplication of "extortion" to the conduct of the Respondents.

As this Court noted elsewhere regarding the Hobbs Act:

> "Given this background-a statute...that if applied here would render a wide range of conduct violative of federal law, a legislative history that fails to evidence congressional awareness of the statute's claimed scope, and a subject matter that traditionally has been regulated by state law-we believe that a narrow interpretation of sec.1014 would be consistent with our usual approach to the construction of criminal statutes." (*Williams v. United States*, 458 U.S. 279, 290 (1982) citing *Enmons*, 410 U.S. at 411)(Also to the same effect regarding the federalization of state laws regarding securities is: *Santa Fe Industries, Inc. v. Green*, 430 U.S. 462,479 (1977)).

Concerns regarding the potential for RICO to super-federalize whole areas of state law have previously been raised by the membership of this Court (*Sedima, S. P. R. L. v. IMREX CO.*, 473 U.S. 479,501 (1985)), (Marshall, J. dissenting, joined by Brennan, Blackmun, and Powell, JJ.: "...quite simply revolutionizes private litigation; it validates the federalization of broad areas of state common law of frauds...").

Language of this Court in *Turkette, Supra*, does not mitigate this point. There, it was stated that a more inclusive definition of "enterprise" under RICO, even if it resulted in a federalization of some state law crimes, was justified where Congress was aware that RICO might move areas of state law crimes into the federal realm. (*Id.* at 452 U.S. 586-587). However, the type of crimes were those that would be effected by "...the role of the Federal Government in the war against organized crime...[entailing] prosecutions involving acts of racketeering..." *(Id.* at 587). There is no evidence to suggest that Congress envisioned federalization of all state law regulating social protest activities.

If Petitioners' characterization of Respondents social protest conduct as Hobbs Act "extortion" is allowed, it will effectually federalize a whole body of state law regulating trespass, disorderly conduct, property damage, unlawful assembly, and tortious interferences of a wide variety.(See: Melly, *The Stretching of RICO : Pro-Life Demonstrators are Racketeers*? 56 U.M.K.C. L. Rev. 287, 309-12 (1988).

Though Amicus, The National Network of Abortion Funds, cites a "lack of remedies in state court" (Br. 26 n.26) (see also Br. Pet. 6, 7), quite the contrary, courts have been quick to apply state law causes-of-action.

Pro-life protestors who intentionally confine people within a clinic building can be liable for false imprisonment (*Roe v. Operation Rescue*, 710 F.Supp. 577 (E.D. Pa. 1989)); Causes of action for infliction of emotional distress have been allowed for the distribution of "wanted posters" of the plaintiff claiming that she was a murderer (*Van Duyn v. Smith*, 173 Ill. App. 3d 523, 123 Ill. Dec. 367, 527 N.E.2d 1005, 1012 (1988), *cert. denied*, 109 S.Ct. 3217 (1989)); claims for public nuisance have been successfully brought against pro-life activists (*National Organization for Women v. Terry*, 886 F.2d 1339, 1361-62 (2d Cir. 1989)). These remedies are, of course, in addition to state

criminal provisions relating to criminal property damage, assault and battery, theft, and trespass that might otherwise be available for activities at or relating to abortion clinics.

C. The Taking of the Human Remains was not "Wrongful"

We have previously argued why the ultimate objective of the taking and burial of the aborted babies was one of religious practice and moral compulsion. Yet because the Petitioners have contended that the Respondents (and of course Migliorino in particular) "...stole and exploited more than 4000 fetuses..." (Br. 6) left out for waste pickup, any implication that this taking constitutes "theft" so as to render the rule of *Enmons* inapplicable must be dispelled.

The retrieval of the aborted babies was from the loading dock area of a pathology lab, over which the Petitioners had no ownership or possessory interest whatsoever.

The remains were in storage drums with "other medical waste." J.A.58 (¶67). The Respondents were informed of the location of the remains by the pathology lab, and Migliorino and others were allowed to perform the retrieval in front of the employees of the lab who "did nothing to stop" them. J.A.58(¶66-67).

This taking of human remains destined for "disposal" by the pathology lab, J.A.57 (¶65), hardly constitutes theft in any sense, but particularly does not qualify as theft of anything over which the Petitioner-clinics had any property or other interest. Further, there is no reasonable expectation of privacy in "waste" or other garbage (using Petitioners' characterization of the human remains) left for collection in an area accessible to the public (*California v. Greenwood*, 486 U.S. 35 (1988); see also *Suburban Serv' n Sweep v. Swiss-Bernina, Inc.*, 91 F.R.D. 254, 260 (N.D.Ill. 1981), attorney-client privilege lost when papers

are retrieved from a trash dumpster in an office building parking lot).

There is no reason why the taking of the aborted babies should not be exempted from the definition of "extortion" along with the other alleged conduct of Migliorino under the rule of *Enmons*.

V. PETITIONERS HAVE FAILED TO ASSERT THAT ANY OF MIGLIORINO'S CONDUCT WAS DIRECTED AT AN ECONOMIC GOAL

Petitioners have attempted to set forth a semblance of allegations to the effect that all of the Respondents, except one, were economically motivated in their alleged wrongful conduct. Petitioners make such allegations against Respondents Scheidler (Br. Pet.46), Pro-Life Direct Action League (Pet.11), Scholberg (J.A.104), Murphy (*Id.*), Terry and Operation Rescue (Br. Pet.46). Except for those remaining Respondents who have no RICO liability in this matter, (Ryan and Wojnar) Migliorino is the sole Respondent against whom absolutely no facts are asserted upon which any colorable argument could be made that her actions were motivated by, or directed toward some economic goal.

Preliminarily, we would submit that the even the attempt by Petitioners to link the conduct of the other Respondents with a financial animus fails utterly. The Petitioners theory is that those Respondents, once they are part of the "inner circle" of the enterprise, "receive financial rewards far beyond what they were capable of earning in the world of legitimate business;" rewards that take the form of salaries and employment benefits (Br. Pet.46). Nevertheless, Petitioners concede that these financial benefits do not come to the Respondents from the Petitioners, or from any member of the purported class, or from any similarly situated abortion clinic. These "benefits" come from third party donors who contribute money to the Respondents work (Br. Pet. 47).

Even conceding, arguendo, the truth of Petitioners' dubious claim that the more "outrageous and highly-publicized the activities" are, the more likely the donors will be to contribute larger sums of money (*Id.*), such an assertion does not prove that these acts are economically directed or motivated.

Considerations of "proximate cause," if nothing else, should prevent the Petitioners from successfully contending that proof that the conduct of the Respondents was directed toward financial gain can be satisfied by evidence that they sought or received donations from contributors. "The link is too remote between..." the benefits donated to, and received by those Respondents and the conduct alleged against them (*Holmes, Supra*, 112 S.Ct. at 1319).

In this regard, Petitioners misconstrue the arguments made by Migliorino before the Seventh Circuit, by arguing that "defendant Migliorino conceded the economic nature" of such entities as the alleged enterprise in this case (Br. Pet.27, n.22) for purposes of satisfying the economic goal test. As was pointed out in the Response of Respondent Monica Migliorino (Miller) to Petition for Writ of Certiorari, pg.13, "Given the economic realities of almost all social and political action aimed at perceived social or moral evils (including abortion) almost all protest organizations have some economic component or cause some economic impact..." Thus, to hold that by reason of that, their activities must, ipso facto, thereby satisfy the economic motive test would render such test totally vacuous.

Regardless of the foregoing, Petitioners, who are after all masters of their own pleadings, have failed to even *attempt* a specific allegation linking the conduct of Migliorino to any economic goal. Even further, they appear to concede that she had no such motivation, as they affirmatively allege that Migliorino was a "volunteer" in PLAL-approved and PLAL-sponsored activities. J.A.104. Petitioners, in seeking RICO liability against this Respondent, whose conduct in opposing

abortion has never been described as other than purely directed toward social and political reform, ask this Court to embark on an unchartered course of RICO construction that drifts aimlessly away from the purposes of Congress; purposes which, according to one chief Senate sponsor of the act, viewed RICO as a major tool in eradicating the "baneful influence of organized crime in our *economic* life," (116 Cong. Rec. 25190 (1970) as cited in *Sedima,S.P.R.L.*, 473 U.S. at 488) (emphasis added).

VI. ADOPTION OF RESPONDENTS' THEORY OF RICO WILL RESULT IN NO EXTRAORDINARY LITIGATION PROBLEMS

A. The Test to be Applied is Objective in Nature

Petitioners inaccurately describe the economic test at the heart of this case as a subjective one (as supposedly involving the "weighing of subjective racial, religious...motivations," Br. 13; "[R]equiring a subjective inquiry ..." Br. 42).

However, although the Seventh Circuit decision uses the phrase "economic motive," the interpretive framework of the lower court ruling is clearly based on the objective test adopted by the Eighth Circuit, and that phrase is clearly interchangeable with the test which addresses the question of whether the *conduct* of a defendant in a RICO case, particularly where the predicate acts are alleged to constitute Hobbs Act extortion, was directed toward an *economic goal or purpose.*

As the Seventh Circuit noted, the Eighth Circuit had required that the RICO enterprise "be directed toward an economic goal." (*United States v. Flynn*, 852 F.2d 1045, 1052 (8th Cir. 1988)); (also: defining an enterprise as an association "which exists for the purpose of maintaining operations directed toward an economic goal..." *United States v. Anderson*, 626 F.2d 1358, 1372 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981).

The Seventh Circuit adopted the *Anderson* definition of enterprise in *United States v. Neapolitan*, 791 F.2d 489, 500 (7th

Cir. 1986), and that adoption was utilized by the court below as a basis, in part, for the economic purpose test.

This test focuses, not on the subjective intent or state of mind of a RICO defendant, but rather, on the *conduct* in question, and whether, as an objective matter, that conduct is of such a nature as can be fairly described as having been directed toward the accomplishing of some financial goal or other economic purpose. While the subjective motive of the defendant may have some bearing on the conduct, particularly if the conduct is of an ambiguous nature, the primary inquiry is on the conduct itself, and the logical, natural, and direct object of its actions.

In fact, there is strong evidence that even the Petitioners recognize this. They concede that the economic requirement in the Eighth Circuit "seems to focus on objective 'goals,'" (Br. 39 n.30). Petitioners further concede that in the analogous field of antitrust law, "'purpose' describes the defendant's [objective] goal or end result..." (Br.43 n.35)(citations omitted). Thus, any inquiry into the economic purposes or goals of a defendant's conduct is intrinsically objective in nature.

B. The Objective Test will Create no Undue Litigation Hardships

Petitioners bemoan, with a litany of litigation horribles, the near-cataclysmic "nightmare" that will result from the adoption of an economic test in RICO cases.("the Pandora's box of economic motive..." Br.14; economic motive requirement "demands a subjective and dangerous inquiry..." Br. 38; "...months-long excursions into the workings of the human mind..." Br.42, are predicted, where the inner motives of defendants will 'politicize' and 'inflame' the case." Br.40).

Despite Petitioners desolate and barren landscape of scorched-earth and endless litigation, the fact is that the test applied by the Seventh and Eighth Circuits (and the Second Circuit for

that matter in *United States v. Bagaric*, 706 F.2d 42 (2d Cir.) *cert. denied*, 464 U.S. 840 (1983) is objectively concentrated on the nature of the defendant's conduct and its goals, and has nothing to do with inner motives, or psychiatric testimony, or anything of the sort. When thus reduced to the real legal issue involved here, the only thing left of Petitioners "litigation nightmare" argument is their hyperbole.

Amicus, United States, makes a similar argument, though somewhat more finely honed. They argue that the requirement that RICO conduct must have "some financial purpose" is an "amorphous requirement [that] is incapable of principled administration by the courts or the government" (Br.20-21), apparently because "the court of appeals' analysis leaves it entirely unclear how much economic benefit would be enough to convert 'political' or 'religious' conduct falling outside RICO into 'economic' conduct falling within the statute's reach." Br.20-21.

Amicus confuse an objective inquiry, of *kind*, into the nature of the conduct (ie. whether the goal of the actions of the defendants is basically economic) with an inquiry of *degree* (ie. whether there is enough economic motive). The former inquiry was adopted by the lower court, and is urged by this Respondent. The later inquiry was not adopted by the Seventh or Eighth circuits, nor is it argued by this Respondent.

There is no reason that the test proposed in this case would be any more unworkable than similar tests used by this Court in similar cases. There is no evidence that the requirement under *Enmons*, *Supra*, that conduct be directed toward "objectives" which are "wrongful" in themselves to be culpable as extortion under the Hobbs Act, is unduly burdensome. Likewise, in the antitrust field, the exemption of conduct that is not "aimed or directed at" the kind of evil which the Sherman Act prohibited, in *Apex Hosiery Co., Supra*, has not created a "litigation

nightmare." Petitioners fears are totally unfounded in this regard.

VII. MIGLIORINO HAS NO RICO CONSPIRACY LIABILITY

In Count IV of the Complaint, Petitioners assert liability against several defendants on a RICO conspiracy theory under § 1962(d). Petitioners assert that claim against "the RICO Defendants." J.A.74, ¶111. "RICO Defendants" are defined by the Petitioners in ¶94 of the Complaint. J.A.65. The list of "RICO Defendants" *excludes* Migliorino. This was clearly intentional as Petitioners, elsewhere in the Complaint, refer to "the RICO Defendants and Defendant Migliorino." Complaint ¶106. J.A.72.

Thus, although Migliorino is referred to in Count IV as a person who "agreed with [the other named defendants]...to conduct and/or participate in the affairs of PLAN," Complaint ¶113, J.A.74, the RICO conspiracy claim does not name her as a defendant, and therefore that claim is not made against her.

Even if Migliorino were a named defendant in the count IV claim, however, the Petitioners have failed to assert a valid conspiracy claim against her.

A "conspiracy is a partnership in criminal purposes," *United States v. Kissel*, 218 U.S. 601, 608 (1910). The parties to a conspiracy enjoy cooperative relationships, as in business, which will facilitate the achievement of the goal of the conspiracy. *Direct Sales Co. v. United States*, 319 U.S. 703, 709 (1943); *United States v. Falcone*, 311 U.S. 205 (1940).

The Seventh Circuit has held that in RICO litigation it is necessary that the Plaintiffs set forth the factual basis for any claim of conspiracy. Conclusory allegations are not sufficient. *Schiffels v. Kemper Financial Services, Inc.*, 978 F.2d 344, 351 (7th Cir. 1992). This rule has been followed uniformly by all eight circuits that have considered the question. (Migliorino

adopts the argument, discussion, and citation of authority on this point contained in the Brief of Respondent Murphy, n.12 and accompanying text.

Petitioner's Complaint, however, fails to detail (and the RICO Case Statement fails to show any evidence for) Migliorino's involvement in any conspiracy to commit predicate acts of extortion that would engage the provisions of RICO. At best, Petitioners have made only the vaguest references to Migliorino's having been "associated with PLAL," J.A.104, and having participated as a speaker at a PLAN convention. J.A.54.

It is clear that Petitioners have stretched, beyond reason, the concept of "conspiracy," in a RICO context, not only by their failure to factually detail Migliorino's participation in any alleged agreement to commit RICO extortion, but by laying at the doorstep of the Respondents random events which are not even part of this record. Petitioners' reference to the tragic death of a physician in Florida (Br. Pet.5) is not only an unsubtantiated irrelevancy in this action, but it is a grossly unfair implication against Migliorino, whose opposition to abortion does not condone nor does it perpetrate acts of violence.

Because "conspiracy law is directed only at those who have intentionally agreed to further the illegal object" of the conspiracy (*United States v. Spock*, 416 F.2d 165, 172-173 (lst Cir. 1969)), and because the Petitioners have not only failed to specify what illegal predicate acts Migliorino agreed, in concert with the other Respondents, to commit, but they have implied her participation purely by reason of her protected First Amendment activities (speaking and associating), they have failed to assert any valid RICO conspiracy claim against her.

CONCLUSION

This Court should affirm the Court of Appeals judgment, dismissing the Complaint of the Petitioners.

Respectfully Submitted,

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Dated: September 29, 1993

APPENDIX

Excerpts from the Answer of Defendant Monica Migliorino (Miller) to the Second Amended Class Action Complaint.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

NATIONAL ORGANIZATION FOR WOMEN, INC., on behalf of itself and its women members who use or may use the services of women's health centers that provide abortions, DELAWARE WOMEN'S HEALTH ORGANIZATION, INC., and LADIES CENTER OF PENSACOLA, INC., on behalf of themselves and all other similarly-situated clinics.

Plaintiffs,

v.

JOSEPH M. SCHEIDLER, JOHN PATRICK RYAN, RANDALL A. TERRY, ANDREW SCHOLBERG, CONRAD WOJNAR, TIMOTHY MURPHY, MONICA MIGLIORINO, VITAL-MED LABORATORIES, INC., PRO-LIFE ACTION LEAGUE INC., PRO-LIFE DIRECT ACTION LEAGUE, INC., PROJECT LIFE, AND OPERATION RESCUE

Defendants.

Civil Action No. 86 C 7888

ANSWER OF DEFENDANT MONICA MIGLIORINO (MILLER) TO THE SECOND AMENDED CLASS ACTION COMPLAINT

Now comes the above defendant Monica Migliorino (Miller) hereinafter referred to as defendant by her attorneys, Craig L. Parshall and local counsel Edward R. Grant, as and for an Answer and Affirmative Defenses to the Plaintiffs' Second Amended Class Action Complaint (hereinafter referred to as complaint) admits, denies, and alleges as follows:

37. ANSWER: Defendant denies having participated in any theft and vehemently denies that any laboratory specimens with which she has ever had contact are stolen laboratory specimens, and affirmatively alleges that defendant Vital-Med routinely abandons to public disposal laboratory specimens consisting of, among other things, the dismembered bodies and remains of aborted unborn children. Defendant further denies any action designed to intimidate and harass clinics by focusing attention on the stolen specimens in at least six states and further alleges that any handling of last rites and burial of aborted unborn babies by defendant was for the purpose of granting such aborted infants the right to a humane and respectful funeral. That such last rites and burials were an act of religious charity, protected under the First Amendment of the United States Constitution and applicable state constitutional provisions and were an act of religious worship and faith. Admit that defendant has exercised her constitutional right to travel across state lines for various and sundry purposes, but specifically denies that this defendant has travelled across state lines for the purpose of accomplishing any theft whatsoever. Defendant does not possess information sufficient to form a belief as the meaning of the phrase "local actions" in paragraph 37 and therefore denies the same. This defendant further denies information sufficient to form a belief as to whether any actions of this defendant resulted in a cancellation of any contract between defendant Vital-Med and any of the plaintiff clinics, and further affirmatively alleges that if any such cancellation occurred it was the result of a voluntary and informed decision of defendant Vital-Med and not by reason of any acts of the defendant. Defendant further denies information sufficient to form a belief as to those allegations of paragraph 37 that relate only to defendant Murphy, or defendant Scheidler.

67. ANSWER: Admit that this defendant made several trips to a premises near, adjacent to, or part of Vital-Med, deny information sufficient to form a belief as to whether the property

was the property of Vital-Med or some other person, agency, or entity, specifically deny that this defendant entered any laboratory building by any means whatsoever, admits that this defendant in an area of a loading dock where the fetal remains of unborn children killed during abortion had been abandoned to disposal retrieved such fetal remains of such unborn children so that the same could be given a decent, humane, and respectful funeral and burial; as to the balance of the allegations and averments of said paragraph this defendant lacks information sufficient to form a belief as to the truth of such allegations. That this defendant specifically denies that any of the actions of this defendant or any other defendant constituted a theft.

75. ANSWER Answering paragraph 75, insofar as the allegations relate to this defendant, she denies any implied, actual, or obvious threat to women who have used, or might in the future consider using the said clinics, and specifically deny any actual implied or obvious threat on the part of this defendant that the privacy of women would be invaded and the confidentiality would be breached by having her name, or personal, or medical information revealed publicly, and affirmatively allege that this defendant took steps to ensure that confidential, personal, or medical information of any woman was not revealed publicly and specifically denies that she ever threatened to reveal such information publicly and, as to the balance of the allegation contained in paragraph 75 deny information sufficient to form a belief as to the truth of the matters contained therein.

77. ANSWER In answering the allegations in paragraph 77 this defendant specifically denies each of the allegations contained therein but affirmatively alleges that this defendant did send letters directly to the landlord and/or prospective landlord of Summit transmitting truthful information and honest advice, done in good faith and in the same fashion as other constitutionally protected political activity protected under the

First Amendment such as boycotts and other economic advocacy efforts.

AFFIRMATIVE DEFENSES TO COUNT I

Defendant Monica Migliorino (Miller) believes that at, and from the very moment of human conception a distinct, separate, unique and precious human life exists, possessed of an eternal soul and created in the image of God. Defendant believes that abortion, by any means constitutes the greatest of injustices because it is aimed at the unborn, it treats them in their defenseless and forsaken state, as if they did not exist, and that they are non-members of the human race.

Insofar as defendant Monica Migliorino (Miller) participated in the handling, funeral rites, and burial of the unborn victims of abortion, she did so motivated by her religious belief and in the context of religious worship, believing that such funeral rites and burials were an act of charity and a work of mercy, affording such unborn victims a measure of recognition of individual worth and human dignity.

In so far as defendant Monica Migliorino (Miller) has advocated against, and opposed abortion, she has done so because she has been motivated to do so by her religious belief in the sanctity of human life, she is commanded to love her neighbor, and she believes herself to be under the spiritual and moral compulsion to rescue those innocent ones who are being delivered up to an outrageous and cruel death.